



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 7, 1994

Janice M. Caldwell, Dr. P.H.
Executive Director
Texas Department of Protective and Regulatory Services
P.O. Box 149030
Austin, Texas 78714-9030

OR94-538

Dear Dr. Caldwell:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 26284.

The Texas Department of Protective and Regulatory Services (the "DPRS") has received a request for the following information:

All personnel records releasable by law for the following DPRS employees: Mary Wall, Sherry Lynn, Tommy Dawson, Rhonda Taylor and Clara Davis. These records include, but are not limited to: dates of employment, job classifications and assignments, salaries, promotions, disciplinary actions and educational histories.

Travel vouchers or any other records related to travel by Mary Wall, Sherry Lynn, Tommy Dawson, Rhonda Taylor and Clara Davis, for the period of October 1993 through April 1994.

A list of all payments to physicians and mental health professionals who examined or evaluated [certain children], including the name and address of the payee, the amount and the date.

We will consider each of the categories of requested information separately.

In response to the request for personnel records of five named employees of the DPRS, you inform this office that the DPRS will release to the requestor copies of Rhonda Taylor's and Clara Davis's personnel files except for that information you believe is "clearly excepted by statute or previous Open Records Decisions." You appear to claim that certain documents in the personnel files are excepted from required public disclosure under section 552.101 of the Government Code, which applies to "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."¹ You have submitted to this office a copy of Ms. Taylor's and Ms. Davis's personnel files for our review.

In both Ms. Taylor's and Ms. Davis's personnel files, you have redacted the employees' social security numbers. In Open Records Decision No. 622 (1994) this office concluded that a social security number is excepted from required public disclosure under section 552.101 of the Government Code in conjunction with 1990 amendments to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii), only if a governmental body obtained or maintains the social security number in accordance with a provision of law enacted on or after October 1, 1990. You have not indicated whether the DPRS obtained or maintains these employees' social security numbers pursuant to a statute enacted on or after October 1, 1990. We thus cannot determine whether the DPRS may withhold Ms. Taylor's and Ms. Davis's social security numbers from the requestor.

In addition to the social security numbers, you have redacted other information from both Ms. Taylor's and Ms. Davis's personnel files. Specifically, you have redacted information regarding Ms. Taylor's and Ms. Davis's participation in certain employee benefit programs, including group health insurance that the employer provides, optional programs such as social security levelling and nonmedical insurance coverages, and a list of beneficiaries to a life insurance policy that the employer provides. This kind of financial information is exempt from disclosure pursuant to section 552.101 if it satisfies both requirements of a two-pronged test: first, the information contains highly intimate or embarrassing facts about an individual's private affairs the publication of which would be highly objectionable to a reasonable individual, and second, the public has no legitimate interest in the information. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1965), cert. denied, 430 U.S. 931 (1977); Open Records Decision No. 545 (1990) at 2 (citing *Industrial Found.*, 540 S.W.2d at 685).

¹Section 552.102 of the Government Code protects information in a personnel file to the extent that its disclosure "would constitute a clearly unwarranted invasion of personal privacy." In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the Texas Court of Appeals determined that the two-pronged test for information deemed confidential by law pursuant to the statutory predecessor to section 552.101 of the Government Code also applied to the statutory predecessor to section 552.102. Thus, whether we consider the personnel file information under section 552.101 or section 552.102 of the Government Code, the same analysis applies.

This office long has distinguished between information about a financial transaction between an individual and a governmental body, which is not confidential under section 552.101, and background financial information or information about a personal financial decision, which is confidential under section 552.101. *See, e.g.*, Open Records Decision Nos. 590 (1991) at 3; 545 (1990) at 2-4; 523 (1989) at 3 (and sources cited therein). Information about an employee's participation in a group insurance program funded wholly or partly by the state constitutes information about a financial transaction between the employee and the governmental body. Open Records Decision No. 600 (1992) at 9. Such information is not confidential. *See id.* Similarly, information about an employee's choice of social security levelling is basic factual information about a transaction between the employee and the governmental body, and it is not confidential. *Id.* at 10.

On the other hand, an employee's decision to enroll in optional insurance coverages, funded wholly by the employee, is information regarding a personal financial decision, and such information is confidential. *Id.*; *see also* Open Records Decision No. 545 at 3-4 (concluding that information regarding employee's participation in optional deferred compensation plan involves personal investment decision and is therefore confidential). Likewise, an employee's designation of beneficiaries is confidential, as is an employee's participation in TexFlex. Open Records Decision No. 600 at 10, 11.

We have reviewed the financial information you have redacted from these two personnel files, and while we agree with many of your decisions, we note that you have redacted information that does not satisfy the two-pronged test. We have therefore marked the financial information that you must withhold from the requestor. You must release to the requestor the remaining financial information.

You also have redacted from both personnel files the employees' drivers license numbers. A driver's license number is not highly intimate or embarrassing information; thus, the DPRS may not withhold it from the requestor.

Ms. Taylor's file contains information regarding other applicants interviewed for the position she eventually was awarded. You have redacted from this information the names of all of the other applicants and their social security numbers. As we stated above, the DPRS may withhold a social security number only if the DPRS obtained or maintains it in accordance with any provision of law enacted on or after October 1, 1990. Additionally, the names of applicants for a position with a governmental body are not excepted from disclosure under any provision of the Open Records Act. Open Records Decision No. 264 (1981) at 1; *see also* Open Records Decision No. 455 (1987) at 8 (and sources cited therein) (listing information about applicants that is generally public). Thus, you must release the names of the applicants.

Ms. Davis's file contains some information regarding Ms. Davis's health. None of the records containing medical information fall within the scope of the Medical Practice Act, V.T.C.S. art. 4495b, § 5.08(b). Accordingly, the DPRS may withhold the information only if it falls within a constitutional or common-law right of privacy. The constitutional right of privacy protects information that falls within one of the "zones of privacy" the United States Supreme Court has articulated,² see *Paul v. Davis*, 424 U.S. 693 (1976); *Roe v. Wade*, 410 U.S. 113 (1973), as well as an individual's interest in avoiding the disclosure of personal matters to the public or to the government. Generally, the constitutional right of privacy protects information that is not within one of the zones of privacy only if it relates to the most intimate aspects of human affairs. See *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986).

We conclude that the medical information in Ms. Davis's file is not protected by a constitutional right of privacy. We conclude, however, that the common-law right of privacy protects some of the medical information from required public disclosure, but only the information that consists of highly intimate or embarrassing facts about an individual's private affairs the publication of which would be highly objectionable to a reasonable individual. The DPRS must release the remaining medical information in Ms. Davis's file to the requestor. For your convenience, we have marked the medical information that the DPRS may withhold.

It appears from your markings in both personnel files that the DPRS intends to release the employees' W-4 forms, with the exception of the social security numbers. Federal law requires that a governmental body deem confidential W-4 forms unless the forms can be deidentified. See 26 U.S.C. § 6103; Attorney General Opinion MW-372 (1981) at 1. In this situation, where a W-4 form is part of an identified personnel file, deidentifying the form serves no purpose. Instead, we believe, the DPRS must withhold the W-4 forms in their entirety.

It also appears from the markings in the personnel files that the DPRS intends to release the home addresses of Ms. Taylor and Ms. Davis. Section 552.117 of the Government Code provides an employee of a governmental body the right to choose whether to allow public access to his or her home address and telephone numbers. To do so, the employee must submit a written, signed request to his or her employer and strictly follow the procedures set forth in section 552.024 of the Government Code. Neither personnel file contains a copy of a written, signed request asking that the employee's home address and telephone number be kept confidential. Accordingly, we assume that you are correct in deciding to release this information to the requestor.

²Matters falling within one of the constitutional "zones of privacy" include matters pertaining to marital activities, procreation, contraception, family relationships, and child rearing and education. See *Paul v. Davis*, 424 U.S. 693 (1976); *Roe v. Wade*, 410 U.S. 113 (1973).

You claim that the DPRS may withhold the personnel files of Mary Wall, Sherry Lynn, and Tommy Dawson pursuant to section 552.103 of the Government Code. Section 552.103(a) excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

You indicate that the DPRS is the petitioner in an on-going Suit Affecting the Parent-Child Relationship concerning the children the requestor has asked about. You advise that Ms. Lynn and Mr. Dawson are Child Protective Services caseworkers who were involved in the child abuse investigation that resulted in this litigation and that Mr. Dawson is the caseworker currently assigned to the children. According to your letter, Ms. Wall supervises both Ms. Lynn and Mr. Dawson, and all three of these individuals represent the DPRS in the litigation.

We have examined the copies of the personnel files you submitted for our review. You have not sufficiently explained, and the documents do not indicate on their face, how the documents relate to the on-going litigation. We thus conclude that section 552.103(a) of the Government Code does not authorize the DPRS to withhold Ms. Wall's, Ms. Lynn's, and Mr. Dawson's personnel files from the requestor. You must, however, withhold all information that is confidential under section 552.101. See Gov't Code § 552.352 (providing penalties for distribution of confidential information). For your convenience, we have marked the information the DPRS must withhold from the requestor.³

You state that you will release to the requestor the travel records he seeks, "with the exception of the portions of these records that identify individual clients or disclose names and addresses of foster parents."⁴ You contend that section 552.101 of the

³We have not marked the employees' social security numbers, home addresses, and telephone numbers. The DPRS must release the social security numbers unless it has obtained or maintained them in accordance with a provision of law enacted on or after October 1, 1990. The DPRS must release the home addresses and telephone numbers unless the employees have so requested in writing pursuant to section 552.024 of the Government Code. We found no such written requests in the files.

⁴You submitted "deidentified" copies of the travel records with the social security numbers of the DPRS employees redacted. We are uncertain as to whether you propose to redact the employees' social security numbers when you release the records to the requestor. Traditionally, our office has concluded

Government Code, which excepts from public disclosure information "confidential by law, either constitutional, statutory, or by judicial decision," excepts these portions from required public disclosure.

You list three statutes, in addition to the common law, that you believe make this information confidential and therefore excepted from disclosure under section 552.101: title 45 of the Code of Federal Regulations section 1340.14(i), title 40 of the Texas Administrative Code section 734.11, and Family Code section 34.08. Title 45 of the Code of Federal Regulations section 1340.14(i) lists requirements that a state must meet to qualify for a grant, awarded under subpart B of part 1340, to develop, strengthen, and carry out child abuse and neglect prevention and treatment programs. By itself, section 1340.14 does not require the DPRS to keep confidential any documents; it only provides that a state must do so if the state wishes to qualify for a grant. Thus, section 1340.14 does not apply to these records.

Title 40 of the Texas Administrative Code section 734.11(a) deems confidential "[i]nformation collected in determining initial or continuing eligibility to receive assistance or services"; however, under subsection (b), the restriction on disclosing information is limited to "individuals and their circumstances." We have examined the travel records you have submitted. The records do not, on their faces, indicate whether all or part of them are "[i]nformation collected in determining initial or continuing eligibility to receive assistance or services." Nor have you demonstrated whether all or any portion of the records contains such information. If the records constitute such information, title 40 of the Texas Administrative Code section 734.11 requires the DPRS to withhold them from the requestor. Failure to do so could result in criminal penalties. See Gov't Code § 552.352.

Section 34.08 of the Family Code applies only to reports, records, and working papers used or developed in the course of an investigation of child abuse or neglect. The travel records you submitted to this office do not indicate on their faces whether they constitute, in whole or in part, reports, records, or working papers that the DPRS used or developed in the course of an investigation of child abuse or neglect. Furthermore, you have not explained whether all or any portion of the records constitutes such reports, records, or working papers. If so, the DPRS must withhold the information. If not, however, the DPRS must disclose the information to the requestor.

(Footnote continued)

that a social security number is available to the public under the Open Records Act. Open Records Decision No. 622 (1994) at 1-2. As we have stated above, however, *see supra* at 2, we concluded in Open Records Decision No. 622 at 6 that a governmental body may withhold a social security number only if the governmental body obtained or maintains it in accordance with any provision of law enacted on or after October 1, 1990.

In response to the requestor's third request for a list of payments to physicians and mental health providers who examined or evaluated the named children, you state that the DPRS has in its possession only a list of the names and addresses of the medical personnel it is aware have provided services to the children. You state that the DPRS does not have information regarding the amounts of payments for the medical services.⁵ The Open Records Act does not require a governmental body to provide information not in its possession or to which it does not have access. *See id.* § 552.021.

You state that section 552.101 of the Government Code, together with title 45 of the Code of Federal Regulations section 1340.14(i), title 40 of the Texas Administrative Code section 734.11, and Family Code section 34.08, require you to withhold the requested list of the names and addresses of medical personnel who have provided services to the named children. As we stated above, section 1340.14(i) of title 45 of the Code of Federal Regulations does not itself require the DPRS to keep confidential any documents. Thus, section 1340.14(i) does not apply to the requested list.

Furthermore, the document you have submitted as responsive to the third request does not indicate on its face, nor have you informed us, whether it is "[i]nformation collected in determining initial or continuing eligibility to receive assistance or services." If such information constitutes any portion of the document, title 40 of the Texas Administrative Code section 734.11 requires the DPRS to withhold that portion. On the other hand, the DPRS must release any information that was not "collected in determining initial or continuing eligibility to receive assistance or services."

Finally, the document you submitted to this office does not indicate on its face, and you have not demonstrated, whether it constitutes a report, record, or working paper that the DPRS used or developed in the course of an investigation of child abuse or neglect. If it does, section 34.08 of the Family Code requires the DPRS to withhold the document. If it does not, however, the DPRS must disclose the information to the requestor.⁶

⁵You suggest that the Texas Department of Human Services, the state's medicaid agency, maintains this information.

⁶With regard to the requested travel records and the requested list of physicians and mental health professionals, you claim that Open Records Letter No. 92-79 (1992) authorizes the DPRS to withhold this information from disclosure. Open Records Letter No. 92-79 considers only whether the statutory predecessor to section 552.103 of the Government Code authorized the Texas Department of Human Services to withhold information regarding the alleged sexual abuse of a child. Open Records Letter No. 92-79 does not discuss whether the statutory predecessor to section 552.101 of the Government Code requires the Texas Department of Human Services to withhold the requested information.

Because statutory law and prior published open records decisions resolve your request, we are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Very truly yours,



Kymberly K. Oltrogge
Assistant Attorney General
Open Government Section

KKO/LRD/rho

Ref.: ID# 26284

Enclosures: Submitted documents

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